

Illinois River Watershed ("IRW"). In support of this motion, the State of Oklahoma shows the Court that there is good cause to allow it to proceed with the limited discovery that it is requesting. The information and things sought are relevant and necessary to the State of Oklahoma's timely presentation of its claims before this Court. These matters are also subject to alteration by the Poultry Integrator Defendants. The information sought is limited, non-intrusive and can be obtained with routine and well accepted protocols. Finally, the information is best sought during the months of March-June as significant land application of waste occurs during this period. The need for urgency in expediting this discovery is supported by the State of Oklahoma's evidence of the creation of imminent threats to human health which are caused by the Poultry Integrator Defendants' waste disposal practices. In support of this Motion, the State of Oklahoma respectfully submits the following:

Prior to filing this motion, counsel for the State of Oklahoma has conferred with Stephen Jantzen, counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc., who has on behalf of the Defendants collectively stated that they do not agree with the granting of this discovery prior to the Rule 26(f) Conference.

INTRODUCTION

1. This case was filed June 13, 2005, and the First Amended Complaint was filed August 19, 2005, after which summons were served on Poultry Integrator Defendants. Motions to dismiss were filed and have been thoroughly briefed by all parties. There has not been a Rule 26(f) conference.

2. In a separate proceeding, the State of Oklahoma, through its Department of Agriculture sought samples of poultry waste and soil from certain Oklahoma poultry operations

in the IRW. The Department of Agriculture attempted to obtain samples by consent and later by validly issued administrative warrants, to carry out its duty to determine the poultry operations compliance with state law. Despite the statutory authority allowing the Department to collect samples of soil and waste, the relevant growers and Poultry Integrators Defendants objected to the sampling, in part because the Department did not intend to limit its analysis to nutrients. A complete analysis of Poultry Integrator Defendants' waste is necessary in order to track the fate of the waste in the environment and characterize the hazards associated with the Poultry Integrator Defendants' land disposal methods. In objecting to the Department's attempt to secure this information, John Elrod, attorney for Poultry Integrator Defendant Simmons Foods, argued in State Court "[I]t's a backdoor attempt by the AG's office to conduct discovery in a case where **Judge Ellison has put it on ice for the moment.**" (emphasis added) (See Attached, Exhibit A, p. 32.)¹

3. The State of Oklahoma has also attempted to secure the needed samples of water running off fields on which Poultry Integrator Defendants' waste has been disposed. Last spring, the State of Oklahoma attempted to secure the needed water samples at the edge of fields which had been used for waste disposal. This effort was limited due to the fact that the State of Oklahoma only had access through public rights of way. Lacking the authority of the Court, only limited edge of field samples could be obtained. Initial sampling, however, indicates that bacterial contamination in runoff from poultry waste applied fields is similar to contamination found in untreated human sewage.

¹ Regarding discovery, while the Poultry Integrator Defendants have used the pendency of this action to defeat attempts by the State of Oklahoma to investigate compliance with state law in the IRW, the Poultry Integrator Defendants have proceeded with their discovery using the Open Records Act of Oklahoma to gain the right to review thousands upon thousands of pages of documents possessed by Oklahoma agencies. See 51 O.S. § 24.5

4. For decades the Poultry Integrator Defendants have disposed of their poultry waste on land located within the IRW. Typically the majority of land application occurs in the Spring to early Summer months at the same time thunderstorms will more likely occur. In addition to nutrients such as nitrogen, potassium and phosphorus, poultry waste contains heavy metals such as arsenic, copper and zinc which the Poultry Integrator Defendants add to the feed in order to promote the growth of their poultry. As a result of adding these metals to the feed, the waste from Poultry Integrator Defendants' poultry contains these heavy metals. The Poultry Integrator Defendants' waste also contains hormones and bacteria as well as other pathogens which are present known hazards to human health and the environment. The State of Oklahoma's investigation of the Poultry Integrator Defendants' waste disposal practices has revealed that certain contaminants associated with the land disposal of poultry waste exist at levels within the environment such that they either pose a risk to human health or lead to the creation of chemicals which threaten human health. For example, poultry waste contains high levels of fecal bacteria which make their way into the waters of the IRW. The State of Oklahoma's scientific investigations as well as a great deal of published scholarly research have concluded that bacteria from the Poultry Integrator Defendants' disposal practices are contaminating the groundwater in the IRW. The research has also demonstrated that once the fecal bacteria from the Poultry Integrator Defendants' poultry enter the waters of the IRW, it can reside there for months. The ground water of the IRW serves as drinking water for many rural Oklahomans and also contributes to surface waters that are used for recreation. While the State of Oklahoma continues its investigation into the magnitude of the risks posed to human health caused by the contamination of this watershed, it is also time critical for the State of Oklahoma to proceed this Spring with its investigation into the source of these risks. Securing edge of field

and ground water samples of the rainwater running off and leaching through the fields on which the Poultry Integrator Defendants dispose of their waste is essential to the State of Oklahoma's efforts to track the pollution from its source through the environment. Similarly, samples of the soil and poultry waste from the Poultry Integrator Defendant's operations are needed and are particularly relevant to tracking pollutants such as fecal bacteria as they move from the poultry houses onto the land and into the waters of the IRW where they threaten the health of people using the water. This evidence collected during the period of heavy land application and spring rains is necessary to confirm that these risks to human health and damage to the environment are attributable to the Poultry Integrator Defendants' waste disposal practices. To continue to improve this analysis the State of Oklahoma must have the requested discovery and that discovery must proceed expeditiously. The importance in the State of Oklahoma's request presently lies in the timing of the collection of samples.

5. The sampling sought by this motion is best conducted during the spring months. It is during these months that the most intense efforts are made to clean the waste out of the poultry houses and dispose of it on the fields. These same months coincide with the rainy season when runoff can be collected. It is during the heavy rains characteristic of the spring rainy season that most of pollution moves off of the disposal fields and into the surface and groundwater. It is following these rains that the levels of bacteria as well other pollutants peak in the surface waters of the IRW. This period of time when waste disposal and runoff are greatest coincides with periods of heavy recreational use of the IRW. Sampling of runoff during this time period is essential to characterizing the source and nature of pollutants released from the Poultry Integrator Defendants' operations during the period when the risk to human health and the environment is particularly acute. This is the time of the year when the most comprehensive

investigation should be conducted in order to match the chemical constituents and bacteria with other sampling of water and sediments as part of the State's ongoing sampling program.

6. The Poultry Integrator Defendants deny that their poultry waste disposal practices are responsible for the degradation and injury to the IRW and the resulting endangerment of human health. (Poultry Integrator Defendants Answer to Paragraph 31 of State of Oklahoma's First Amended Complaint). The nature and extent of the State of Oklahoma's request for water, waste and soil samples is authorized by law, limited, non-intrusive, and will be conducted as routine tests for which there are well accepted protocols. In fact, tests of waste and soil are already required by law to be made by each grower before poultry waste can be removed from the poultry barn and applied to any field. Title 2 O.S.A. Section 10-9.7 & 10-9.19 (2000). Thus, the discovery which is requested by this motion will not disturb the operations of the growers or the Poultry Integrator Defendants nor will it cause any damage to the land where these samples are gathered. The soil and waste sampling which is sought will follow routine procedures used in this industry. Similarly, the sampling of the surface and ground water will be done under widely accepted protocols and will not result in the lost use of the fields on which the sampling is conducted.

7. Ultimately, the ingredients of the feed determine the chemistry of the poultry waste, the contaminants in the soil on which it is disposed and the contaminants in the water which migrates from those fields into the surface and ground water of the IRW. The feed formula is controlled by the Poultry Integrator Defendants and, therefore, can be changed by the Poultry Integrator Defendants at anytime. A change in the feed formula may change the content of the waste and may make it more difficult to track the waste as it moves through the environment. The State of Oklahoma is entitled to obtain and preserve unadulterated evidence

that connects Poultry Integrator Defendants' practices to the State of Oklahoma's claims. The sampling when obtained can be preserved just as any other evidence.

8. The State of Oklahoma is seeking discovery involving the inspection and sampling of property which is owned by the Poultry Integrator Defendants and/or by growers under the Poultry Integrator Defendants' control. The contracts of the Poultry Integrator Defendants require their growers to comply with all State laws and regulations. Through their contracts with the growers and their control over them, the Poultry Integrator Defendants have the right to secure for the State of Oklahoma the access that is sought through this motion.

9. The State of Oklahoma requests that the Court grant it leave to obtain inspection of property under the custody or control of the Poultry Integrator Defendants and to issue third party subpoenas pursuant to FRCP 34(c) & 45 in order to compel the Poultry Integrator Defendants and their growers to submit their premises for collection of poultry waste, soil samples, water samples from edge of field runoff during rain storms and ground water samples. The State of Oklahoma further requests that the Court enter an order that will expedite this discovery so that needed samples, particularly water samples can be taken during or immediately following rain storms.

10. The State of Oklahoma is cognizant of the importance of bio-security. As such, all sampling will be conducted in accordance with all applicable standards and procedures promulgated by the state agricultural authorities governing bio-security.

ARGUMENTS AND AUTHORITIES

11. The Federal Rules of Civil Procedure govern discovery in this proceeding. Rule 26 mandates that the parties to an action make certain initial disclosures in advance of formal discovery. Fed. R.Civ. P 26(a)(1). Rule 26(f) mandates that the parties confer as soon as

practicable to consider their claims and defenses, settlement possibilities, and to arrange for the required initial disclosures. Generally parties may not engage in formal discovery before the parties have conferred as required by Rule 26(f). Fed. R. Civ. P. 26(d).

12. The Court has discretion, however, to alter the discovery schedule and allow a party to proceed with formal discovery in advance of the Rule 26(f) conference. Federal Rules of Civil Procedure Rule 26(d) provides in pertinent part:

Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).

Consequently, this Court may order expedited discovery upon a showing of good cause. Qwest Communications International, Inc. v. Worldquest Networks, Inc., 213 F.R.D. 418, 419 (D. Colo. 2003); Pod-Ners, LLC v. Northern Feed & Bean of Lucerne Ltd. Liability Co., 204 F.R.D. 675, 676 (D. Colo. 2002).

13. Factors to be considered by the Court in applying the “good cause” standard include: (1) the scope of the requested discovery; (2) the purpose for requesting the expedited discovery; (3) the burden on the defendants to comply with the requests; and (4) how far in advance of the typical discovery process the request was made. In re Fannie Mae Derivative Litigation, 227 F.R.D. 142, 143 (D.D.C. 2005); Qwest, 213 F.R.D. at 420. The Federal Rules of Civil Procedure do not provide a standard for the Court to follow in determining whether expedited discovery is appropriate. Furthermore, case law discussing the issue of expedited discovery is limited. In re Fannie Mae, 227 F.R.D. at 142. Two common judicial approaches have, however, evolved: the aforementioned “good cause” or reasonableness standard and a more stringent standard articulated in the case of Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982). The more stringent Notaro factors require a party moving for expedited discovery to

show: (1) irreparable injury; (2) some probability of success on the merits; (3) some connection between the expedited discovery and the avoidance of the irreparable injury; and (4) some evidence that the injury which will result without expedited discovery looms greater than the injury the defendant will suffer if the expedited relief is granted. In re Fannie Mae, 227 F.R.D. at 142.

14. Reviewing the limited case law on the issue of expedited discovery reveals that the Tenth Circuit has not yet formally adopted either approach. Clearly, however, the District Court in Colorado and other federal courts have utilized and adopted the “good cause” or reasonableness standard, particularly in cases involving potential irreparable harm. Qwest, 213 F.R.D. at 420; Pod-Ners, 204 F.R.D. at 676; Dimension Data North America, Inc. v. Netstar-1, Inc., 226 F.R.D. 528, 531 (E.D.N.C. 2005) (“[W]here plaintiff requests expedited discovery in preparation for a preliminary injunction determination, an expedited discovery test limited strictly to the *Notaro* factors is not appropriate. Rather, a standard based upon reasonableness or good cause, taking into account the totality of the circumstances, is more in keeping with discretion bestowed upon the court in the Federal Rules of Civil Procedure.”). Therefore, this Court should apply a good cause standard based upon the totality of the circumstances in determining whether Plaintiff is entitled to conduct expedited discovery in advance of the Rule 26(f) conference.

15. The State of Oklahoma’s scientific investigation has revealed that the water in the IRW contains levels of bacteria which pose a danger to human health from primary body contact (swimming, wading and canoeing). That investigation has also revealed evidence that ground water, including water in the numerous springs in the IRW, has been contaminated so as to be a hazard to persons who drink from such sources. In fact, health officials in Washington County,

Arkansas have already found it necessary to post signs at a number of springs warning of contamination. Clearly any alleged “harm” claimed by the Poultry Integrator Defendants or their growers from the requested sampling is far outweighed by the importance of human health and water.

16. There have been numerous studies, including scientific studies in peer reviewed journals by researchers at the University of Arkansas, pointing to the Poultry Integrator Defendants’ waste disposal practices as a primary source of bacterial contamination of the ground and surface water in this watershed. Most recently, in the Journal of American Water Resources Association, an article whose authors included Drs. Ralph K. Davis and John Van Brahana of the University of Arkansas, researching the transport and survival of fecal bacteria from the fields into the ground and surface waters of the IRW concluded:

Because of the unique geology of the area, shallow aquifers have less restricted flow paths from the surface. This is environmentally undesirable owing to the high probability of contamination. The spreading of poultry litter on fields is a common practice in this area. If *E. coli* from animal manures infiltrates the aquifers via surface runoff, the water supply may become contaminated.

Davis, 2005, *Escherichia Coli Survival in Mantled Karst Springs and Streams, Northwest Arkansas Ozarks, USA*, AWRJ, Paper No. 03134, p. 1279 at 1285. (See Attached Exhibit B)

17. The State of Oklahoma’s investigation has also discovered evidence that the Poultry Integrator Defendants’ waste disposal practices have caused algae to form in the once pristine waters of the IRW. This algae has not merely caused aesthetic, taste and odor problems in that water, it has also lead to the creation of carcinogens and eutrophic conditions. When the water is treated by the public water systems, the treatment of the algae laden water has produced carcinogens in the drinking water. There are over twenty public water supply systems in Oklahoma which draw water from the IRW.

18. The State of Oklahoma has been prevented from continuing its independent administrative efforts to determine compliance with state laws due to the Poultry Integrator Defendants' objections to the Oklahoma Department of Agriculture's sampling efforts and the false claim in state district court that this Court has stayed or "iced" the State of Oklahoma's investigation. This spring the State of Oklahoma needs to collect samples of the poultry waste which has accumulated in the poultry houses of the IRW, the soil on which that waste has recently been disposed, and the water running off of those fields and/or leaching into the ground water as part of its effort to trace to their source the contaminants causing these conditions. It is important that all of this research be conducted simultaneously and it should be done during the spring rains. This investigation is integral to the State of Oklahoma's efforts to verify that Poultry Integrator Defendants' waste disposal practices are causing human health to be endangered on a wide scale.

19. Regardless of which standard this Court applies to this discovery request, the request should be granted. The high bacteria levels in ground water used for drinking and in the water in which people recreate; as well as the creation of carcinogens in drinking water from public water supplies in the IRW, which are created by Poultry Integrator Defendants' waste disposal practices constitute irreparable harm. The Poultry Integrator Defendants' waste disposal practices which are creating these imminent dangers to human health are at the heart of this case. Time is of the essence. The State of Oklahoma, having been frustrated from pursuing its investigation should be empowered by this Court to proceed promptly to complete its characterization of these risks.

WHEREFORE, Plaintiffs request that the Court enter an order expediting discovery for the limited purpose of allowing the State of Oklahoma to immediately seek inspection of

property in the control or custody of the Poultry Integrator Defendants and issue subpoenas to third parties in order to secure samples of poultry waste, soil upon which such waste has been disposed, water which has runoff such fields during rain storms and water which has leached into the ground from these disposal fields. The State of Oklahoma further requests that the Court expedite the discovery process so that the needed samples can be taken this spring and particularly so that the water samples can be taken during or immediately following rains. The State of Oklahoma requests such other relief as the Court deems just and proper.

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